United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7097-7129

ORIGINAL

To be argued by
SIDNEY A. SCHWARTZ

B
P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

RAYMOND INTERNATIONAL, Inc.,
Plaintiff-Appellee,

against

PETER KIEWIT-SLATTERY (Joint Venture) sued herein as Peter Kiewit Sons' Company and Slattery Associates, Inc., d/b/a Peter Kiewit Sons' Company-Slattery Associates, Inc.,
Defendant-Appellant.

PETER KIEWIT-SLATTERY (Joint Venture) sued herein as Peter Kiewit Sons' Company and Slattery Associates, Inc., d/b/a Peter Kiewit Sons' Company-Slattery Associates, Inc.,
Third-Party Plaintiff-Appellee,

against

BAYSHORE CONCRETE PRODUCTS COMPANY,
Third-Party Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

THIRD-PARTY DEFENDANT-APPELLANTS REPLY BRIEF

ALEXANDER, ASH, SCHWARTZ & COHEN
Of Counsel to
KIRKEL, MCLAUGHLIN & BOECKMANN
Attorneys for Third-Party Defendant-Appellant, Bayshore Concrete Products Company
801 Second Avenue
New York, New York 10017
(212) 889-0410

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THIRD-PARTY DEFENDANT-APPELLANTS REPLY BRIEF

It is not appellant's purpose, in submitting this reply brief, to subject this Court to reargument of the propositions which have already been fully stated in appellant's opening brief. It would not be proper to do so nor is such course necessary. The irreconcilable contentions of the

parties are squarely presented by their respective briefs already filed. The function of this reply brief will, therefore, be limited to pointing out in the briefest manner possible certain fallacies in the Appellee's argument.

Preliminary Statement

This Court is already in possession of appellant's brief and the arguments presented therein.*

This reply brief is primarily directed to the third-party plaintiff-appellee, Kiewit, and as applicable to the answering brief of plaintiff, Raymond.**

Kiewit's and Raymond's Statement of Facts, although incorrect, are not in issue and a restatement of facts will not be presented in this reply brief.

It has been previously conceded by Kiewit that the judgment by Raymond against Kiewit is due, payable and just. Raymond, perhaps in an exercise of caution, has submitted an answering brief supporting the trial Court's determination that Bayshore is liable.

POINT I

Bayshore has standing to raise the issues presented in its original brief, since these issues are questions of law and not fact.

In an attempt to deprive Bayshore of Appellate review, Kiewit, by a juxtaposition of inapplicable cases, has alleged that Bayshore may not raise essential issues before

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* As stated in the original brief, numerals in parentheses, preceded by the letter "A" refer to pages in the Appendix; other numerals refer to pages in the transcript; briefs will be indicated by page number.

** The reference to Kiewit, Raymond and Bayshore refer to the respective parties as abbreviated in the original briefs.

this Court, i.e., was there a sale of the alleged defective instrumentality.

Kiewit claims that the issue was never raised or presented to the trial Court and that, therefore, Bayshore may not raise the issue before this Court. The issue was before the trial Court, discussed by the Court and improperly decided by the Court. The Court's legal decision was erroneous.

The Court's decision on questions of fact, contrary to Kiewit's position, is not being challenged in this appeal; what is being challenged is the Court's application of law to the facts decided.

Kiewit's third-party complaint against Bayshore, paragraph "5", specifically stated that Bayshore was to supply "concrete girders or beams, their straps and/or lifting hooks . . . " (A. 13). This allegation was denied by Bayshore (A. 21). In addition, Bayshore's supplying of lifting straps or lifting hooks is not contained in the contract between Bayshore and Kiewit (499).

It is commonplace, perhaps improperly, in a non-jury action for trial counsel to rely on the Court's expertise in framing the legal issues and to stress in their presentation the factual disputes. In the absence of a jury, requests to charge and summation, legal issues are not articulately raised. They do, however, remain in the case for Appellate review.

Kiewit argues that the failure to raise the factual issue of *sale* is a waiver of this issue in an Appellate Court. Kiewit fails to accept, that the Court's imposition of liability on Bayshore was not a decision of fact, but a decision of law. The Court, in the non-jury hearing, determined certain issues of fact. The Court then applied a legal conclusion to the determination of fact. The legal conclusion is a question of law which is always reviewable by an Appellate Court. *Foster* v. *United States,* 320 Fed. 2d 717 (2d Cir. 1964).

Kiewit improperly argues that the issue of sale was not before the Court. As stated above, the issue of sale was framed in the pleadings. An issue framed in the pleadings remains in the case and is subject to Appellate review. *First National Bank of Cincinnati* v. *Pepper,* 454 Fed. 2d 626 (2d Cir. 1972).

Further, the Court was aware of the issue and questioned Kiewit's counsel, Appellant's brief (5). An erroneous application of law is reviewable by this Court, *Foster, supra.*

Notwithstanding Bayshore's clear right of Appellate review of the legal issues raised, the rule of standing argued by Kiewit is not absolute and may be disregarded by this Court. *Green* v. *Brown,* 398 Fed. 2d 1006 (2d Cir. 1968).

Bayshore, in its brief, *Point I,* has raised what counsel for Kiewit claims to be a "novel" issue, Appellee's Brief (18). It may be novel to Kiewit's counsel, but it has received considerable attention in our Law Reviews and scholarly commentary, Appellant's Brief (7 & 8, N. 1 and 2). The rationale of *Green, supra,* would permit this Court to decide an issue of far reaching import even if not raised in the Court below. The question as to whether or not a Court imposed liability, i.e., strict liability, should exist under the facts of this case and other similar cases would permit this Court to review the question, even if not specifically raised in the trial Court.

POINT II

The alleged instrumentality was specifically excluded under the contract.

Kiewit argues that the "bearing pad" specifically excluded from Bayshore's contract is not the lifting loop, hook or device referred to at the trial. Kiewit stresses in its brief (16) that the term "bearing pad" does not appear in the 492-page transcript. It accuses Bayshore of engaging in semantic argument.

Bayshore agrees semantics should never prevent or deter a Court from the proper and just determination of a legal issue. But, who is engaging in semantics?

Kiewit's witness, Mr. Freelund, whose qualifications are so laudibly extolled in Kiewit's brief (10), referred to the loops as "lifting pads" (226, 243); he, in fact, insisted on referring to the loops as *"pads"* (235).

The word "bearing" has been authoritatively defined as "Supporting;—for a structural member as a wall, partition or the like that *supports a load."* (Emphasis added, *Webster's New International Dictionary,* 2d Ed., unabridged.) Mr. Freelund's insistence on the use of the term "lifting pad" as the correct nomenclature of the loops and the proper definition of the word "bearing" clearly indicates that the so-called loops were excluded from Bayshore's contract. In the light of Mr. Freelund's testimony, Kiewit's present position borders on the absurd. Kiewit, in its brief (2) stresses the size and weight of the concrete T-beams. They were 130 feet long, 8 feet wide, 8 feet high and weighed 130 tons. Keeping in mind, Kiewit's suggested definition of the term "pad", a paraphrase of Mr. Freelund's testimony would have these massive concrete T-beams being lifted by "a cushion-like mass of some soft material, as for comfort or protection or for filling out or stuffing" Kiewit's Brief (16).

A question was proposed above as to who has engaged in semantics. The question has been answered.

POINT III

There was no sale or bailment of the bearing pads by Bayshore to Kiewit.

Kiewit argues that if there was no sale of the bearing pads, Bayshore is still liable on the grounds that a bailment relationship existed. After stating unequivocally that a bailment existed, Kiewit goes on to prove the lia-

bility of Bayshore under the bailment. Kiewit cites an impressive, but inapplicable, list of cases.*

Prior to any discussion of the cases holding a bailor liable, it must be determined if a bailment existed.

A bailment is a consensual relation and has been described as a species of trust or quasi-trust agreement. *8 C.J.S. Bailments,* Section 1:

> "A bailment is a bi-lateral relationship between the parties concerning an item of personal property. It is 'a delivery of personal property for some particular purpose, or a mere deposit, upon a contract express or implied, *and that after such purpose has been fulfilled it shall be redelivered to a person who delivered it,* or otherwise dealt with according to his directions or kept until he reclaims it, as the case may be." (Emphasis added)

> "A bailment is, of course, merely a special kind of contract; it describes a result which in many instances does not flow from the conscious promises of the parties made in a bargaining process but from what the law regards as a fair approximation of their expectations (see 9 Williston, Contracts (3rd ed.), Sec. 1030, p. 879, n. 7; Sec. 1033, pp. 884-885; Sec. 1065, pp. 1011-1023). Hence, in formulating a rule to determine the extent of the liability of the defendant, we must concern ourselves with the realities of the transaction in which the parties engaged."

Ellish v. *Airport Parking Co. of America, Inc.*, 345 N.Y. Supp. 2d, 650, 653:

A bailment relationship is consensual and cannot be created out of "whole cloth." The relationship and obliga-

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* Kiewit's raising of this point is an implicit recognition that the legal relationship of the parties is subject to legal review, contrary to its position in Point I of its brief.

tions must be agreed to. A prime *hallmark* of bailment is the bailee's obligation to return the personal property.

> "A bailment is the delivery of personal property for a particular purpose on express or implied contract with the understanding that it shall be re-delivered to the person leaving it or kept until he reclaims it after fulfillment of the purpose for which it was delivered."

Lash v. *Knapp,* 143 N.Y. Supp. 2d 518, 519:

The Court's review of this record would indicate that no bailment was created, whether the bailment be called for hire, mutual or gratuitous. All of the cases cited by Kiewit, including *Delaney* v. *Towmotor Corp.,* 339 Fed. 2d 4, involve a consensual or bi-lateral agreement.

Although no bailment existed, Kiewit's strong reliance on *Delaney* requires additional discussion. The alleged defective instrumentality in this case, assuming Kiewit's position to be correct, was to be used once and then destroyed. It must be stressed that the single use of the instrumentality in this case and its immediate destruction does not bring the instrumentality under the law governing strict liability. Strict liability is a Court created species of tort. The Court created the liability under what it felt to a social-public policy argument. Primarily these arguments concerned an adequate distribution of the cost factor and a control over re-generating injury-producing articles. It is clear in this case that neither of these justifications are applicable to the accident involved in this appeal.

Kiewit's reliance on *Delaney* is based on the fact that the fork-lift was not a mass-produced article on the level of automobiles or commonly used drugs. It is, however, an item that is to be used more than once and is produced on a scale to which the *general public* should be protected.

In addition, the very nature of a fork-lift indicates that its life-span is to cover many years.[1]

Delaney held the bailor liable, not merely as a bailor but as a manufacturer who had *invited and solicited* the use of its product, citing *Randy Knitwear, Inc.* v. *American Cyanamid Co.*, 11 N.Y. 2d 5, 226 N.Y.Supp. 2d 363. In this case the record is devoid of any solicitation or invitation. Contrarily, the record clearly shows that Kiewit used the bearing pads on its own initiative and in violation of its contract with Raymond.

Conclusion

The judgment of the Court below against the Appellant should be reversed; Appellant reserves for oral argument any phase of Appellee's brief which is not specifically dealt with herein, to which ends this brief is

Respectfully submitted,

ALEXANDER, ASH, SCHWARTZ & COHEN
Of Counsel to
SEMEL, MCLAUGHLIN & BOECKMANN
Attorneys for Third-Party Defendant-Appellant, Bayshore Concrete Products Company
801 Second Avenue
New York, New York 10017
(212) 889-0410

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[1] Similarly, Kiewit's reliance on *Wheeler* v. *Standard Pool & Manufacturing Co.*, 497 Fed. 2d 897, is erroneous. The machine in question was not to be used once but many times by a considerable number of people for a long period of time.

Services of three (3) copies of the within brief is hereby admitted this 17th day of September, 1976

Jones D. Lyszczyk, Esq. (Joseph D. Alessi)

Attorney for defendant Peter Kiewit-Slattery

Services of three (3) copies of the within brief is hereby admitted this 17th day of September, 1976

Spriemers Fish & Warner

Attorneys for plaintiff — NRC Raymond International, Inc.